

**Interstate Builders, Inc. and International Association of Bridge, Structural, Ornamental & Reinforcing Iron Workers Local 48, affiliated with International Association of Bridge, Structural, Ornamental & Reinforcing Iron Workers.**  
Cases 17–CA–19586, 17–CA–19620, and 17–CA–19683

July 31, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS  
TRUESDALE AND WALSH

On February 3, 1999, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision. By notice dated June 14, 2000, the Board invited the parties to file supplemental briefs addressing the framework for analysis of refusal-to-consider and refusal-to-hire violations set forth in the Board's May 11, 2000 decision in *FES*, 331 NLRB 9. The Respondent and the General Counsel thereafter filed supplemental briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order as modified and set forth in full below.

We agree with the judge that the Respondent violated Section 8(a)(3) and (1) of the Act by initially refusing to hire and by later terminating employee John Norman, and refusing to hire<sup>2</sup> applicants John Buntin, Derrick Haggard, Wesley Stillsmoking, and Floyd Woods as

ironworkers because they were members of or sympathizers with the Union.<sup>3</sup>

In *FES*, supra, the Board restated the elements that the General Counsel must establish to meet its burden of proof in a discriminatory refusal-to-hire case as follows:

- (1) That the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.

Although the judge decided this case before the issuance of *FES* and applied slightly different standards in assessing the General Counsel's case, we nevertheless find that the General Counsel has met his burden of proof regarding the initial refusal to hire Norman, and the later refusal-to-hire Buntin, Haggard, Stillsmoking, and Woods, under the standards set out in *FES*.

The facts are as follows. On February 22 and May 10, 1998,<sup>4</sup> the Respondent advertised in a local newspaper for "certified welders or iron workers." The Respondent stipulated that it hired 59 ironworkers between February 23 and September 15. On February 23, John Norman, a journeyman ironworker and union organizer, filled out a job application at the Respondent's facility. The Respondent's general superintendent Tom Young asked Norman the meaning of the "organizing stuff" listed on his application. Norman answered that in addition to organizing, he had been an ironworker since 1970 and fit the requirements of the advertised positions. Holding his index finger close to his thumb, Young told Norman that the Respondent had come "that close" to signing an agreement with the Union, and refused to hire him. On March 17, however, the Respondent offered Norman a

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> In his Conclusion of Law 5, the judge found that the Respondent violated Sec. 8(a)(3) and (1) by "refusing to employ or consider for employment" the applicants in question. As discussed below, we conclude that, under the *FES* framework, the evidence establishes a refusal-to-hire violation. It is thus unnecessary to decide whether the Respondent also violated Sec. 8(a)(3) and (1) by unlawfully refusing to consider the applicants for hire, because the remedy for such a violation would be subsumed within the broader remedy for the refusal-to-hire violation. See *Sommer Awning, Co.*, 332 NLRB No. 136, slip op. at 2 fn. 4 (2000); *Budget Heating & Cooling*, 332 NLRB No. 132, slip op. at 2 fn. 3 (2000). The judge's conclusion of law is modified accordingly.

<sup>3</sup> We also agree with the judge that the Respondent violated Sec. 8(a)(1) of the Act by coercively interrogating applicants and employees about their union membership and union activity, creating the impression that employees' union activities were under surveillance, threatening to impose more onerous working conditions, and implying that support of a union would be futile, and Sec. 8(a)(3) and (1) by imposing more onerous working conditions on and laying off employee David Hibdon.

In adopting the judge's findings, we find it unnecessary to rely on *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967); and *J. E. Merit Constructors*, 302 NLRB 301 (1991).

<sup>4</sup> Unless otherwise noted, all subsequent dates are in 1998.

job, and he began work on March 24. He was terminated on March 30.<sup>5</sup>

On May 12, in response to the second advertisement, Buntin, Woods, Haggard, and Stillsmoking, accompanied by Norman, went to the Respondent's offices to apply for positions as ironworkers, bringing with them completed job application forms. Each of these applicants was an experienced journeyman ironworker, with training and experience relevant to the advertised position. Norman told Tom Young that he had four individuals who wished to submit applications in response to the newspaper advertisement. Young asked if the individuals were "union" ironworkers, and Norman replied that they were. Young then asked Norman if the Union had received a letter from the Respondent, stating that it did not recognize the Union as the representative of its employees. When Norman responded that the Union had received the letter, Young reiterated that the Respondent did not want union representation. Norman replied that the individuals were not there for "union representation," but were seeking to fill the advertised jobs, and asked if the four employees could submit applications. Young refused, and, as Norman unsuccessfully attempted to hand him the completed applications, stated that the Union should "go file another goddamn complaint."<sup>6</sup>

We find that the General Counsel has successfully established each element of the *FES* standards for a refusal-to-hire violation. With respect to element (1), the newspaper advertisements seeking ironworkers and the Respondent's stipulation that it hired 59 ironworkers between February 23 and September 15 demonstrate that Respondent was hiring at the time of the alleged unlawful conduct in February and in May, and that it continued to hire employees after refusing employment to Norman, Buntin, Woods, Haggard, and Stillsmoking.<sup>7</sup> With respect to element (2), the fact that the Respondent eventually hired Norman demonstrates that it viewed him as having experience and training relevant to the position,

and the record establishes that Buntin, Woods, Haggard, and Stillsmoking were also experienced journeyman ironworkers.<sup>8</sup> With respect to element (3), Young's hostile reaction to the attempts by Norman on February 23, and by Buntin, Woods, Haggard, and Stillsmoking on May 12, to submit applications, especially his query whether the applicants were "union" ironworkers and his statement that the Union should file another complaint, provide ample evidence that union animus contributed to the decision to deny the applicants employment. Thus, we are satisfied that the parties litigated, and the General Counsel successfully established, each element of the prima facie case of a discriminatory refusal to hire under *FES*, supra.

Under *FES*, once the General Counsel has established a prima facie case, the burden shifts to the respondent to show that it would not have hired the alleged discriminatees even in the absence of their union activities or affiliation. *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir.1981), cert. denied 455 U.S. 989 (1982). We agree with the judge that the Respondent has failed to meet its *Wright Line* burden of showing that it would not have hired the discriminatees even in the absence of their union activity. In this regard, we note that, with respect to the applications of Buntin, Woods, Haggard, and Stillsmoking, the Respondent does not contend in its exceptions and supplemental brief that its rebuff of these employees' attempt to gain employment had any other basis than the fact that they were accompanied by a union representative. Rather, the Respondent asserts that it refused to hire these employees based on its rule that applicants for employment "speak for themselves" and not through union representatives. We agree with the judge, for the reasons he states, that this argument is without merit. With respect to Norman, the Respondent has offered no explanation as to why it initially refused to hire him.

Accordingly, we conclude, in agreement with the judge, that the Respondent violated Section 8(a)(3) and (1) of the Act by initially refusing to hire John Norman,

<sup>5</sup> The judge found that both the Respondent's initial refusal to hire Norman and Norman's subsequent termination violated Sec. 8(a)(3) and (1) of the Act.

<sup>6</sup> The judge found that the Respondent's refusal to hire Buntin, Woods, Haggard, and Stillsmoking violated Sec. 8(a)(3) and (1) of the Act.

<sup>7</sup> Thus, we find this case distinguishable from *HVAC Mechanical Services*, 333 NLRB No. 24 (2001). In *HVAC*, the Board remanded the case to the judge for further proceedings in light of *FES*, because the Board found that the General Counsel failed to satisfy *FES*'s requirement that "If the General Counsel is seeking a remedy of reinstatement and backpay based on openings that he knows or should have known have arisen prior to the commencement of the hearing on the merits, he must allege and prove the existence of those openings at the unfair labor practice hearing." *FES*, supra, 331 NLRB at 14. In this case, the General Counsel has demonstrated the existence of such openings.

<sup>8</sup> We find this case distinguishable from *Merit Contracting, Inc.*, 333 NLRB No. 64 (2001). In *Merit*, the Board remanded the case to the judge for further findings of fact with respect to the applicants' job qualifications. In that case, the respondent attempted to demonstrate that it would not have hired the applicants in the absence of their union activities, but the judge precluded exploration of whether the respondent there would have hired the applicants, and quashed the respondent's subpoena seeking details of the applicants' training and qualifications. Here, by contrast, the Respondent actually hired Norman after initially refusing him a job. With respect to the May 12 applicants, at the hearing the Respondent explored the job histories of Woods, Buntin, Haggard, and Stillsmoking on cross-examination. Moreover, the Respondent does not contend here that the applicants were not qualified or would not have been hired.

and by refusing to hire John Buntin, Derrick Haggard, Wesley Stillsmoking, and Floyd Woods.<sup>9</sup>

#### ORDER

The National Labor Relations Board orders that the Respondent, Interstate Builders, Inc., Oklahoma City, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from
  - (a) Interrogating applicants and employees about their union membership and union activity.
  - (b) Creating the impression that employees' union activities are under surveillance.
  - (c) Threatening to impose more onerous working conditions.
  - (d) Implying that support of a union would be futile.
  - (e) Imposing more onerous working conditions because of or in retaliation for engaging in union activity.
  - (f) Laying off or terminating employees because of or in retaliation for engaging in union activity.
  - (g) Refusing to employ job applicants for the position of ironworker because they are members of or sympathizers with the Union.
  - (h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
  - (a) Within 14 days from the date of this Order, offer John Buntin, Derrick Haggard, Wesley Stillsmoking, and Floyd Woods reinstatement in positions for which they applied, or if such positions no longer exist, to substantially equivalent positions, without prejudice to seniority or any other rights and privileges they would have enjoyed absent the discrimination against them.
  - (b) Make whole John Norman and those individuals identified in subparagraph (a) above for any loss of earnings and other benefits suffered as a result of our unlawful refusal to hire them, in the manner described in the remedy section of the decision.
  - (c) Within 14 days of the date of this Order, offer David Hibdon and John Norman full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.
  - (d) Make whole David Hibdon and John Norman for any loss of earnings and other benefits suffered as a re-

sult of the unlawful layoff of Hibdon and the unlawful termination of Norman, in the manner described in the remedy section of the decision.

(e) Within 14 days from the date of this Order, remove from its files the following: any reference to the unlawful refusal to hire John Norman, John Buntin, Derrick Haggard, Wesley Stillsmoking, and Floyd Woods; any reference to the unlawful layoff of David Hibdon; and any reference to the unlawful termination of John Norman; and within 3 days thereafter, notify the employees in writing that this has been done and that the unlawful conduct of the Respondent will not be used against them in any way.

(f) Preserve, and within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payments records, including an electronic copy of such records if stored in electronic form, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Oklahoma City, Oklahoma facility copies of the attached notice marked "Appendix."<sup>10</sup> Copies of the notice, on forms provided by the Regional Director for Region 17, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 2, 1998.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

<sup>9</sup> Chairman Hurtgen notes that there is some evidence that the Union's actions were motivated by a desire to put the Respondent out of business. He finds, however, that there is not enough evidence in this record to warrant the conclusion that the job applicants at issue were not bona fide applicants.

<sup>10</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX  
NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize  
To form, join, or assist any union  
To bargain collectively through representatives of their own choice  
To act together for other mutual aid or protection  
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate you about your union membership or union activity.

WE WILL NOT create the impression that employees' union activities are under surveillance.

WE WILL NOT threaten to impose more onerous working conditions on you because of or in retaliation for engaging in union activities.

WE WILL NOT imply that support of a union would be futile.

WE WILL NOT discriminatorily lay off or terminate you because of or in retaliation for engaging in union activity or other protected concerted activities.

WE WILL NOT impose more onerous working conditions because of or in retaliation for engaging in union activity, or other protected concerted activities.

WE WILL NOT refuse to employ job applicants for the position of ironworker because they are members of or sympathizers with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the date of the Board's Order, offer employment to John Buntin, Derrick Haggard, Wesley Stillsmoking, and Floyd Woods in the positions for which they applied or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges that they would have enjoyed had they been hired.

WE WILL make whole John Buntin, Derrick Haggard, John Norman, Wesley Stillsmoking, and Floyd Woods for any loss of earnings and other benefits that they may have suffered as a result of our unlawful refusal to hire them, less any net interim earnings, plus interest.

WE WILL, within 14 days of the date of the Board's Order, offer David Hibdon and John Norman full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole John Norman and David Hibdon for any loss of earnings and other benefits that they may have suffered as a result of the unlawful layoff of David Hibdon and the unlawful termination of John Norman, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files the following: any reference to the unlawful refusal to hire John Norman, John Buntin, Derrick Haggard, Wesley Stillsmoking, and Floyd Woods; any reference to the unlawful layoff of David Hibdon; and any reference to the unlawful termination of John Norman; and WE WILL, within 3 days thereafter, notify the employees in writing that this has been done and that our unlawful conduct will not be used against them in any way.

INTERSTATE BUILDERS, INC.

*Frank A. Molenda, Esq.*, for the General Counsel.

*Charles Ellis, Esq.*, of Oklahoma City, Oklahoma, for the Respondent.

*Loren Gibson, Esq.*, of Oklahoma City, Oklahoma, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Oklahoma City, Oklahoma, on September 23 and 24, 1998. Subsequent to an extension in the filing date, briefs were filed by the General Counsel and the Respondent. The proceeding is based on an initial charge filed March 2, 1998,<sup>1</sup> by International Association of Bridge, Structural, Ornamental & Reinforcing Iron Workers Local 48, affiliated with International Association of Bridge, Structural, Ornamental & Reinforcing Iron Workers. The Regional Director's further consolidated complaint dated June 22, 1998, alleges that Interstate Builders, Inc. (Respondent), of Oklahoma City, violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by unlawfully creating the impression of surveillance, threatening employees with discharge, more onerous working conditions and out of town assignments; interrogating employees; informing them that it would be futile to select the Union; assigning more onerous work assignments; refusing to consider for hire or to hire named job applicants; laying off David Hibdon on February 25; and discharged John Norman on March 30 because of their union or other related protected, concerted activities.

<sup>1</sup> All following dates will be in 1998, unless otherwise indicated.

Upon a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

Respondent is engaged as a steel erection contractor in the construction industry in the Oklahoma City area. It annually purchases and receives goods and materials valued in excess of \$50,000 directly from points outside Oklahoma and it admits that at all times material has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent employs persons in the operating engineer and the iron workers crafts and it has a collective-bargaining agreement with the Operating Engineers Union covering its operators but it does not have any collective-bargaining agreement covering its ironworker employees. In late January 1998, Iron Workers Union organizer, John Norman, visited Respondent's jobsites and enlisted the aid of Jan Coleman, an operating engineer and an employee of the Respondent, who agreed to help organize ironworker employees. Coleman then circulated authorization cards among Respondent's employees at the end of January and in early February.

David Hibdon, one of Respondent's employees, signed a union card on January 29. Hibdon testified that on February 2, he attended a group meeting conducted by Respondent's foreman, Ronnie Wehr. During the meeting, Wehr said he knew who signed union cards and said that if they went union, they would be sent home if they didn't have their tools or equipment, or if they were late for work. Wehr also said the employees would work out of town and would not work in Oklahoma City if they signed with the Union. He said that he would have to quit if the Union came in because he would owe \$3000 in back dues. Hibdon identified himself as a card signer and said that he signed a card for long term benefits. Wehr answered that he would not get any more money than he was getting then.

For the remainder of that day, and in the days that followed, Wehr assigned Hibdon duties which included carrying heavy pipes, which could have been moved on a forklift and set time limits on his work, telling him it had to be done in 2 hours time.

On February 3, Coleman was called into a meeting with General Superintendent Tom Young at Respondent's facility. Young asked if Coleman was trying to "unionize" the company, and if he was trying to get cards signed and asked what kind of cards were involved. Coleman showed him a card and Young asked specifically which ironworkers had signed. Young concluded by telling Coleman that Respondent was not going to be union. A few days later, Young approached Coleman and asked if anybody else had signed the union authorization cards.

On February 11, Union Organizer Norman and Union Business Agent John Hunter met with Bill Napier, Respondent's owner, at a restaurant in Oklahoma City. They asked Napier to

recognize the Union as collective-bargaining representative for the Respondent's ironworkers. Napier asked for time to consider the matter but eventually turned down the Union.

Journeyman ironworker Jerry Griffith is president of the Local Union but still works actively in the trade. After hearing of Respondent from Norman, he went to Respondent's office on March 20 (while he was on layoff from his previous job), turned in an application and met with Tom Young. Young knew Griffith, who had worked in the past with his brothers. He took the application, they spoke for a minute and Young said he didn't like the treatment the Union was giving him, he thought it was unfair. A notation on Griffith's application (made by Young) said:

Told Jerry hire him in the morning at \$16.00, no benefits. He said he wasn't sure he could work without benefits. He would think about it. I said it was up to him.

Griffith remembers that Young said no benefit and they spoke of coming back in the morning but he was unsure of whether he was told he was going to be hired or not. He did not go back the next day as he was recalled by a former employer.

On Sunday, February 22, an ad appeared in the Sunday Oklahoma newspaper in which the Respondent sought "certified welders or iron workers." The next day Norman went to Respondent's facility and filled out an application. After a few minutes, Superintendent Tom Young came out holding the application. He pointed at the document and asked what the "organizing stuff" was all about (Norman's description of his union job). He asked what Norman had been doing besides organizing and Norman replied that he'd been an ironworker since 1970, that he fit the bill for Respondent's newspaper ad and he asked for the job. When Young said no, Norman asked if Young wanted to talk about it. Young then held his index finger and thumb close together and said Respondent owner Napier had been that close to signing a (union) contract. Norman asked again if the Respondent would hire him. Young repeated the answer, no. After leaving Norman wrote contemporaneous notes described as "contact sheets" memorializing the conversation.

On February 24, Hibdon was questioned by his supervisor, Wehr, who asked whether the Union had called Hibdon. The employee acknowledged that he had received a call. Wehr asked what they wanted and Hibdon answered that the Union wanted to know if he would go to work at a jobsite in Watonga. At the end of the day, Wehr told Hibdon that he wouldn't be needing any more and should talk to the owners the next morning. Hibdon met with Harry Young the following morning and was told he would not be working that day. He was sent home and never returned to Respondent.

On March 17, Norman received a call from Respondent offering him employment. He was unable to report immediately but started work on March 24. He was assigned to work at Tinker Air Force Base in the Oklahoma City area. He worked with employee Richard Hopper welding handrails and guardrails and during the workday, he spoke with Hopper about the Union. On March 27, a rain day, Norman worked at the union hall and saw Hopper come in to join the Union and then learned that the Union sent him to work for a union contractor.

On March 30, Norman returned to work at the jobsite. Foreman Harry Young asked where Hopper was and Norman told him that Hopper would not be there because he had signed him up with the Union. Norman told Young that he needed another ironworker to help him on the job because there was too much for one man. Young asked why, because Norman would just organize them. Norman said that was his job, to give the Union story to people. Norman also said the job was worth \$22.57 an hour and that's what he wanted to make instead of the \$16 he was receiving. Young said he wasn't putting up with "this shit" and told him to get his check. Norman said he would work for the \$16 an hour but Young told him to go to the office, repeating that he would not put up with it. At the office he met with Tom Young who was drawing up Norman's final check. Norman asked about the \$22.57 an hour and asked why Respondent would not give that to him. Tom Young said that pushers and foreman got that rate and added that Norman had agreed to \$16 an hour and that was what he would get. Norman relented and said he had agreed to work for \$16 and would work for that, however, Young got Norman's check and he was terminated.

By letter dated April 6, to Napier, Union Business Agent John Hunter sent the Respondent five applications of members who were journeyman ironworkers with 4 or more years of experience seeking work "at the same terms extended to other employees." The letter also assured the Respondent that any "protected activity" would be conducted in strict accordance with Board guidelines and would not interfere with their efficiency and productivity as employees.

By letter dated April 9, Owner Napier advised Business Agent Hunter that the Company did not recognize the Union as the representative of any of its employees and that it deals directly with applicants and not through representatives, that Respondent did not accept applications mailed in by the Union but rather applicants were invited to come to the office for an interview. The letter also said the Respondent wasn't hiring but it would keep applications on file for a reasonable period of time and would consider them when it was hiring.

On May 10, Respondent ran another ad seeking ironworkers. Norman spoke to ironworkers John "Gib" Buntin, Floyd Woods, Derrick Haggard, and Wesley Stillsmoking who were at the union hall looking for work and asked if they were interested in applying for work at Respondent at \$16 an hour. When they arrived, Norman told Tom Young that he had four guys who wanted to fill out applications for employment in response to the newspaper ad. Young asked if they were union ironworkers. Norman said that they were and Young asked if the Union got "the letter" (a reference to a April 9 letter sent by Napier). Norman said he had and Young replied that they did not want union representation. Norman said they were not "union representation" but were there to fill the jobs that were run in the newspaper ad. Buntin asked about the newspaper ad and Young replied that they did not need any help. Norman asked if Respondent would let the four ironworkers put in applications. Young said, "no" and as the men left Norman tried to hand in the previously filled out applications. Young rejected them and said, "go file another goddamn complaint."

During the time period between Norman's initial application for employment on February 23 and the rejection of the four ironworkers on May 12, Respondent hired 38 employees of which 32 were ironworkers. Between May 18 and September 15, the Respondent hired 35 more employees, including 27 in ironworkers positions.

### III. DISCUSSION

The proceeding involves the Respondent's apparent failure to hire union affiliated applicants for positions as ironworkers, its discharge or layoff of two union activists, as well as certain related Section 8(a)(1) unfair practice allegation including alleged threats, interrogations, and surveillance.

#### A. Refusal to Hire Criteria

The Board endorses a causation test for cases turning on employer motivation, see *Wright Line*, 251 NLRB 1083 (1980); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), however, the foundation of 8(a)(1) and (3) "failure to hire" allegations rest on the holding of the Supreme Court that an employer may not discriminate against an applicant because of that person's union status, *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

Based on the test set forth in *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), and *KRI Constructors*, 290 NLRB 802, 811 (1988), and case cited therein, it is found that in a case of this nature the General Counsel is required to meet an initial burden of proof and establish that (1) an individual files an employment application, (2) the employer refused to hire the applicant, (3) the applicant is or might be expected to be a union supporter, (4) the employer has knowledge of the applicant's union sympathies, (5) the employer maintains animus against union activity, and (6) the employer refuses to hire the applicant because of such animus. In order to rebut the General Counsel's case, the employer must establish that for legitimate reasons the applicant would not have been hired absent the discriminatory motive. The qualifications of job applicants may be an expected element of why an employer might refuse to hire any individual and, accordingly, it is customary in relation to criteria (1) that the record be developed to show that an applicant has the basic job experience or training to match up with the position for which the employer is seeking or accepting applications. However, there is no requirement that the General Counsel show (at this stage of the proceeding) that an applicant has superior qualifications that would mandate his selection for employment. Therefore, a resolution of an applicant's total qualifications beyond his basic suitability for the position involved is not an issue relevant to the basic criteria necessary to prove a violation of the Act. This approach is consistent with the approach taken to discrimination claim under the Civil Rights Act of 1964, compare *Walker v. Mortham*, 158 F.3d 1177 (11th Cir. 1998), and *Patterson v. McLean Credit Union*, 491 U.S. 164, (1989), cited therein.

The Respondent's defense must relate primarily to the relevant criteria and information or evidence placed into the record should relate to the criteria involved in a material and relevant manner. Otherwise, it is inappropriate to pursue collateral or tangential matters that have no direct bearing on the immediate

decision directed to the scope of the proper allegations of the Regional Director's complaint.

### B. Procedural Matters

On brief the Respondent challenges my ruling at the start of the hearing which substantially granting the Charging Party's petition to revoke Respondent's subpoenas and it argues that in order for any decision on relevancy, materiality, or credibility to be made, the decisionmaker must have the subpoenaed documents before him and that this was not possible without requiring the production of the documents and the opportunity for knowledge of the contents of those documents. The Respondent's subpoena requests the following documents:

1. The current constitution of the International Union
2. The current by-laws of Local 48
3. All current collective-bargaining agreements to which Local 48 is a party.
4. The following records generated between January 1, 1998 and the present relating to Jerry Griffith, John Buntin, Wesley Stillsmoking, Floyd Woods and/or Derrick Haggard;
  - a. Records of the payment of dues and other financial contributions to the International Union or Local 48.
  - b. Records of the payment of pension and other retirement benefits made by the International Union or Local 48.
  - c. Records of referrals for work to any employer through any hiring hall or other referral system operated by Local 48.
  - d. Records of work performed for any employer.
  - e. All letters, memoranda, notes and reports relating to the activities or status of such persons as members of the International Union or Local 48.
5. All minutes of meetings of the membership of Local 48 from January 1, 1998 to present.
6. All minutes of meetings of any committee of Local 48 from January 1, 1998 to the present.
7. All resolutions passed by Local 48 from January 1, 1998 to the present.
8. All manuals or other instructional material relating to means and methods to organize employees for the purpose of collective bargaining including so-called "salting" initiatives.
9. All newsletters and other publications of general distribution to the membership of the International Union and Local 48 from January 1, 1997 to the present.
10. Documents and other material generated by, or for, John Norman relating to his schedule of work and duties as an employee of Local 48 including, but not limited to, calendars, time slips, appointment books for the period of March 23, 1998 to April 3, 1998.
11. All written reports or notes of any oral reports submitted by John Norman between January 1, 1998 to the present in his capacity as an employee of Local 48.
12. All letters written or received by Local 48, notes, memoranda or other material referring to or relating to Interstates Building, Inc.

At the start of the hearing, I entertained the Union's argument in support of its motion to quash the subpoena and extensive argument by the Respondent in support of its position, including the citation of decisions by two administrative law judges. The Union responded citing the Board's decision in *M. J. Mechanical Services*, 324 NLRB 812 (1997). I then cited two decisions of my own in which I had ruled on subpoena issues similar to those involved here and I then granted the Union's motion to revoke except for items 9 and 10. I also stated that most of the material sought was too speculative in nature and that it was a fishing expedition type of subpoena. I then stated that:

If some things come up during examination of the witness that would tend to indicate the presence of documents that are relevant to some issue that will be decided here, then I will entertain any subsequent motion by the Respondent for the production of those documents.

Among the witnesses called by the General Counsel were Union Organizer John Norman, Local President Jerry Griffith, and Local Executive Board Member John Buntin. On cross-examination Buntin was asked about the makeup and duties of the Board and about any reports to the Board or at members' meetings about organizing activities. Over the Union's objection the witness was allowed to answer and he spoke about verbal reports but indicated there were no written reports. Griffith was cross-examined about any union rules against members working for nonsignatory employees (he was unaware of any). Norman was asked a similar question on cross-examination as well as questions about the Union's goal in organizing the Respondent, the Union's referral system, the contact sheet document he filled in (which was produced), and about any notes or reports of his activities.

The Respondent made no further request for the production of documents as a result of its cross-examination, and no such request was made after the General Counsel rested his case. In the presentation of its own case, the Respondent called Union Business Agent Hunter as a witness and questioned him about the Local Union's affiliation with the International, the Union's constitution and bylaws, whether either the Local or International Union published newsletters, and whether the involved charges were the subject of any article.

As indicated above, after quashing the Respondent's subpoena with respect to items 1-8 and 11, I provided an invitation for any subsequent motion for production of documents, if something indicative of relevant information arose during examination of witnesses. No such motion or request was made and, even on brief, no further, specific request is made except to argue generally about information about the nature of the Union's "salting" program. Otherwise, the Respondent had an opportunity to examine or cross-examine the union business agent, organizer, president, and an executive board member and I find absolutely no basis for any possible finding that it somehow was prejudiced by my rulings.

Under these circumstances, I conclude that there is no reasonable basis for finding that the additional material sought in the subpoena would be relevant to or led to the admission of material evidence that would contribute to the development of

the record necessary for evaluation and resolution of the issues raised in the Regional Director's consolidated complaint.

While the Respondent asserts that the description of the material sought in Respondent's subpoena was carefully drafted to respond to the issues raised in the formal documents, it appears to be general in nature and similar to other subpoena requests generated as a common response in many refusal to hire or so called "salting" proceedings. Essentially, it appears to be a fishing expedition or, at best, an attempt at pretrial discovery, which is not allowed by the Board. Otherwise, I find that the nature of the material sought in the subpoena was adequately made known by the description in the subpoena or is generally made apparent by the context of counsel's statements, and I find, that is not relevant or material to any issue bearing on the Respondent's conduct in this case dealing with its interactions with the job applicants. In this connection, it is noted that the Respondent's request would appear to be a collateral attack on the Union's organizing practices or "salting" program and the likelihood of it producing any information that would tend to relate to any material fact in dispute is so remote that it is an unjustified burden on the parties and the procedures of the Board. There is no reasonable basis for thinking that a tangential critique of the information sought would aid in the development or evaluation of the record and, accordingly, my ruling at the hearing is affirmed.

#### Alleged 8(a)(1) and (3) violations

Employee Hibdon signed an authorization card on January 29 and then attended a gathering of employees on February 2 at which Foreman Wehr spoke to four or five employees. Wehr said that he told them that when he was in the Union there were good things and a lot of things he didn't agree with and that he then quit. He spoke about dues, waiting for jobs, and that a union contractor would not tolerate the attendance habits of some of Respondent's present employees and would get a replacement from the union hall and that they would be sent home from a union job if they came to the job without their tools. He also agreed that he spoke about being referred to out-of-town jobs but denied that he made any observation about the owner's views about unions.

As noted, Hibdon testified that Wehr said he knew who signed union cards, what would happen to the employees if they went union (would be sent home if they didn't have their tools or equipment, or if they were late for work, that employees would not work in Oklahoma City if they signed with the Union). Wehr said he would have to quit if the Union came in because he owed \$3000 in dues, and told Hibdon he would not get any more money with the Union than he was getting then.

The foreman's alleged statement that he knew who signed union cards, stands un rebutted and it clearly creates the impression that the Respondent had a source of knowledge of the employees union activities (Hibdon had signed a card only 4 days previously), and that their activities were under surveillance. This is a violation of Section 8(a)(1) of the Act, as alleged. Moreover, it colors the climate under which his other remarks must be viewed and, contrary to the Respondent's claim, it tends to substantiate the coercive effect of Wehr's other remarks. Hibdon testified that he admitted to Wehr that he had

signed a card because Wehr had said that he already knew who had signed. I find Hibdon's demeanor to be credible and I further find that his understanding of what Wehr said should be credited over the similar but somewhat sanitized version offered by Wehr. Wehr thereafter gave Hibdon (who weighs 140 to 147 pounds), more than usual supervision, time limits, and assigned him to moving by hand 120 pound steel poles a distance of 300 feet, a task that usually would be done with a forklift. Although Wehr testified that they did not have a forklift on the job, that Hibdon did it on his own without being told to, and denied that he gave him harder task or time limits, I find Hibdon's testimony to be more believable, especially in view of the timing of these actions after Wehr's coercive remarks and after Hibdon's identification as a card signer, and I credit Hibdon's testimony regarding this occurrence.

I find that Foreman Wehr's statements also threatened employees with changes and more onerous working if the company recognized the Union. In keeping with his threats, Wehr began to more strictly supervise Hibdon and made him perform physically demanding duties. I find that the Respondent has not persuasively shown that this was done for legitimate reasons. Under these circumstances I find that this occurred because of Hibdon's admitted union sympathies, and I find, that the Respondent did threaten and impose more onerous working condition in violation of Section 8(a)(1) and (3) of the Act as alleged.

On February 3, Coleman was called into a meeting with General Superintendent Tom Young at Respondent's facility. Young asked if Coleman was trying to "unionize" the company, and if he was trying to get cards signed and asked what kind of cards were involved. Coleman showed him one and Young asked specifically which ironworkers had signed the union cards. Young concluded by telling Coleman that Respondent was not going to be union and later asked Coleman if anybody else had signed the union authorization cards. This conduct was not refuted by Young and Young thereafter told union applicants they would not be considered and to "go file another goddamn complaint." I therefore conclude that the Respondent is shown to have interrogated employees and indicated that union organization would be futile in violation of Section 8(a)(1) of the Act as alleged.

Near the end of the day on February 24, Wehr asked Hibdon if the Union had called him and when he said, "Yes," Wehr questioned what they wanted and Hibdon admitted that they were offering him a job with a contractor in Watonga. This questioning about Hibdon's union affairs constitutes interrogation in violation of Section 8(a)(1) of the Act and at the end of the day (after apparent contact with the owner), Wehr told him he wouldn't be needed at the airport anymore because they were trying to cut cost and that he should report to the owners the next day. He then reported to Harry Young who told him he wasn't needed that day and to call the next morning.

Wehr admitted that the airport job lasted for another 2 weeks but asserts that he sent him to the office because, in the steel erection business, you "tend" to need less people at the end of a job. Wehr, however, did not independently testify as to the latter fact but agreed to the Respondent's counsel wording in a leading question asked on direct examination. Harry Young

was called by Respondent as a witness but he was not asked about the events of February 24 and 25.

The series of events involving Hibdon's employment and the Union's efforts to organize the Respondent show that the Respondent was aware of and opposed to the Union's efforts and it specifically was aware that Hibdon had signed up and had received an offer for a job with an apparent union contractor. It also engaged in other illegal conduct, discussed above, and, in addition, the timing of Hibdon's layoff, right after his unlawful interrogation by his foreman is sufficient to support an inference that the employees' protected activities were a motivating factor in Respondent's subsequent decision to layoff or terminate him. Accordingly, the testimony will be discussed and the record evaluated in keeping with the criteria set forth in *Wright Line*, 251 NLRB 1083 (1980), see *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), to consider Respondent's defense and whether the General Counsel has carried its overall burden.

As pointed out by the Court, in *Transportation Management Corp.*, supra, an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the union or protected concerted activity. Here, the Respondent provided no specific, independent, persuasive reason for Hibdon's layoff other than the counsel's bland suggestions about the nature of the steel erection business. Under these circumstances, I am not persuaded that Hibdon would have been laid off on February 24, in the absence of the union activity and, accordingly, I conclude that the General Counsel has met his overall burden and shown that the Respondent violated Section 8(a)(1) and (3) of the Act in this respect, as alleged.

After Norman started work on March 24, he worked with employee Richard Hopper welding handrails and guardrails and spoke with Hopper about joining the Union. On March 27, a rain day, Norman worked at the union hall and saw Hopper come in to join the Union and then learned that the Union sent him to work for a union contractor. On his return to work at the airbase jobsite, Foreman Harry Young asked where Hopper was and Norman told him that Hopper would not be there because he had signed him up with the Union. Norman told Young that he needed another ironworker to help on the job because there was too much for one man. Young asked why, because Norman would just organize them. Norman said that was his job, to give the union story to people.

The Respondent called witness John Dyer, a manager for the general contractor at the airbase jobsite, who saw the above conversation. Dyer recalled Norman adamantly saying that he heard the job was a prevailing wage job and that although he had said he would work for \$16 an hour, since he learned it was a prevailing wage job he wanted \$22 an hour. Dyer said he did not hear the rest of the conversation.

I credit Norman's testimony that Young then told him that he wasn't putting up with "this shit" and told him to get his check. Norman said he would work for the \$16 an hour but Young told him to go to the office, repeating that he would not put up with it. At the office he met with Tom Young who was drawing up Norman's final check. Norman again asked about the \$22.57

an hour and asked why Respondent would not give that to him. Tommy Young said that pushers and foreman got that rate adding that Norman had agreed to \$16 an hour. Norman then agreed that he said he would work for \$16 and would work for that, however, Young got Norman's check and he was terminated.

The Respondent knew of Norman's position as a union organizer and initially has refused to consider him for hire. It appears that it again became annoyed with him after leaving that his coworker had left for a union job. For the reasons noted above, I again find, that the General Counsel has made a *Wright Line* showing and that the Respondent is required to persuasively show that it would have taken the same action even in the absence of the union activity.

Respondent's defense is based on an argument that it was "privileged" in refusing to (continue to) employ Norman because of his "demand" for a \$22 an hour wage rate and it argues that Norman voluntarily quit because the Company would not agree. Although witness Dyer said Norman's tone was adamant, he also said Norman did not say he would quit if he didn't get the raise.

Here, I credit Norman's testimony that he separately told both Harry and Tom Young that he would continue to work for the previously agreed on rate. On brief the Respondent alludes to Norman's attendance record, yet it is clear that Norman was not told and was not terminated for any attendance problem, and I find, that this contention indicates pretext on the part of the Respondent rather than a contrived plan by Norman to "quit" in order to pursue his other union duties, as suggested by the Respondent.

Otherwise, a request for increase pay (because Norman apparently learned it was a prevailing wage job), does not support the Respondent's speculative conclusion that Norman implied that he would quit if the Respondent didn't comply. First, Norman credibly testified that that he separately told both Youngs that he would continue to work for \$16 an hour (the mere fact that Norman did not refer to this in his contemporaneous notes does not mean that it did not occur and Norman specifically testified that his "contact sheets" generally cover what events occurred he feels to be relevant and that he does not attempt to include a "complete" description of an event). Secondly, there is no indication that either Harry or Tom Young directed Norman to work or that Norman refused any such direction. Instead, Harry Young clearly express his irritation with Norman by commenting that Norman would just organize any new helper (and induce him to leave as Hopper did), said he wouldn't put up with "this shit," and he then terminated him by telling Norman to get his check.

Under these circumstances it is clear that Norman was fired because Young would not put up with Norman's organizing efforts. Otherwise, the Respondent has failed to persuasively show that Norman would have been terminated even in the absence of his union activities and I conclude that the General Counsel has shown that the Respondent's conduct violates Section 8(a)(1) and (3) of the Act, as alleged.

### C. Refusal to Hire or Consider Union Applicants

As noted above, the test set forth in *Fluor Daniel*, supra, requires that the General Counsel must establish that (1) an individual files (or attempts to file), an employment application, (2) the employer refused to hire or to consider the applicant, (3) the applicant is or might be expected to be a union supporter, (4) the employer has knowledge of the applicant's union sympathies, (5) the employer maintains animus against union activity, and (6) the employer refuses to hire the applicant because of such animus. In order to rebut the General Counsel's case, the employer must establish that the applicant would not have been hired absent the discriminatory motive. The qualifications of job applicants may be an expected element of why an employer might refuse to hire any individual, and, accordingly, it is customary in relation to criteria (1) that the record be developed to show that an employer is seeking or accepting applications. However, there is no requirement that the General Counsel show (at this stage of the proceeding), that an applicant has superior qualifications that would mandate his selection for employment. Here, the applicants indicated they were qualified journeyman iron workers with 4 or more years of experience and the fact, when one applicant, Norman, subsequently was hired he worked successfully without any challenge or question as to his job skills.

On the second day of this hearing Richard Hopper was called by the Respondent and testified that after he worked several union jobs no new referrals were available and Norman and Hunter asked him to go back to the Respondent and help the Union by reporting back any safety (OSHA type) violations he observed. He also testified that Norman said they were "going to make everybody go union with all their power" and that "if they can't be a union company then we'll want to get them out of business." Hopper testified he went back to the Respondent (where he had worked fairly regularly for 15 years) but did not call back to the Union. After 4 months, he then made the foreman and crane operator mad after he spray painted the inside of the Respondent's crane (red on white) and was too afraid or embarrassed to try to go back to work. After a month of sleeping in his truck and doing odd jobs in the Dallas area, he returned to Oklahoma and was rehired by the Respondent on September 23 (the day the hearing opened in this proceeding), Norman was not questioned about his alleged remark by either party, however, he was asked on earlier cross examination by the Respondent about the "ultimate goal" of the Union and he answered that it was to "sign them to a union contract."

Based on Hopper's testimony the Respondent asserts that the Union was motivated by a desire to run the Company out of business and that the "salting" was a subterfuge which deprives the applicants of their status as employees.

While serious, Norman's singular remark was the latter part of a statement which first emphasized the Union's desire to make the company "go union." This "threat" was not conveyed to the company by Hopper and I am not persuaded that the remark was anything more than braggado in view of Norman's specific testimony, that the "ultimate goal" was to get the Company "to sign a union contract." Otherwise, I find that the Respondent's speculation about the Union's motivation does not adversely affect on the status of the job applicants and, accord-

ingly, I find that consistent with the Board and the Supreme Court's decision in *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995), all the alleged applicant-discriminatees are bona fide applicants.

Turning to a review of the specific criteria in *Fluor Daniel*, supra, I find that it is clear that (1) John Norman, Jerry Griffith, John Buntin, Derrick Haggard, Wesley Stillsmoking, and Floyd Woods all filed or attempted to file applications with the Respondent and (2) that except for Griffith, the Respondent refused to consider or hire these applicants, although it did reverse its initial decision to refuse to hire Norman. When Norman first applied on February 23, Superintendent Tom Young twice answered "no" when Norman asked if the Respondent would hire him and he was not called and offered a job until March 17, shortly after the initial charge was filed in this proceeding.

(3) The applicants also clearly identified themselves as union members and organizers and (4) the Respondent knew from its other contacts with the Union that each of the applicants was a union journeyman and union supporter.

It appears that the Respondent initially considered the possibility of recognizing the Union and signing an 8(f) agreement and the Respondent argues that Tom Young was indifferent to Norman's union affiliation and harbored no animus during his conversation with Griffith. These assertions, however, are belied by the fact that Young already had engaged in violations of Section 8(a)(1) of the Act in his interrogation of Coleman on February 3 and the Respondent, through Foreman Wehr, also had interacted with employee Hibdon in a manner that violated the Act, as discussed above. Young also gave Norman a point blank refusal without concurrent or subsequent explanation that might have indicated that he had some other or legitimate reason for not considering him for hire. Other violations of the Act occurred during this time frame and Foreman Harry Young's demeanor (I'm not putting up with this "shit") at the time Norman was terminated are factors that also are indicative of animus. I conclude that the record is sufficient to show animus, and I also find, that animus otherwise is implicit in the Respondent's discriminatory practices and could be found here even without specific proof of antiunion motivation, see *J. E. Merit Constructors*, 302 NLRB 301, 304 (1991), and *Great Dane Trailers*, 388 U.S. 26, 34 (1967).

Lastly, (6) I find that the record is sufficient to support an inference that the Respondent's antiunion animus was a motivating factor in its decision to not hire or not accept applications from the alleged discriminatees, even as it was running want ads seeking ironworkers and even at a time, between February 23 and May 12 when it hired 32 ironworkers and between May 18 and September 15, when it hired 27 more employees in ironworker positions.

The Respondent, in addition to the other arguments noted above, asserts that Young's reason for not hiring Norman initially was because he had requested the union scale of \$22.57 an hour, a scale above the range of \$12 to \$16 an hour it usually paid. This reason was not given to Norman, and I find, it to be pretextual. Moreover, Young made no effort to discuss or negotiate wages as was the situation in *GM Electrics*, 323 NLRB 125 (1997), a case cited by the Respondent and, otherwise, a

Respondent cannot, without more, merely presume that a union affiliated applicant would not work at the wage level paid by the company, see *Norman King Electric*, 324 NLRB 1077, 1085 (1997).

With respect to the “group” applications on May 12, the Respondent contends that Norman’s presence with the applicants was only as their collective-bargaining representative (he did most of the talking) and that it means that the applicant’s were dealing with the Respondent through the Union, contrary to the Respondent’s right to not recognize the Union. Here, on April 6, Union Business Agent Hunter sent five applications to the Respondent under his cover letter and in response, on April 9, owner Napier rejected them and advised the Union that it would only deal with applicant’s who came to its office for an interview. This policy is not challenged in the allegations herein, however, when four applicants did come to the office, in response to the Respondent’s May 10 ad seeking iron workers, they were told the Respondent didn’t need any help and superintendent Young angrily rejected their attempt to hand in their prepared applications.

The Respondent asserts a right to do as it did because the applicants were accompanied by a union representative and because the Respondent lawfully did not “recognize” the Union, however, the right to not recognize the Union does not equate with a right to reject union affiliated applicants merely because they may be accompanied by a union agent. This would appear to be especially true in the construction industry where unions and employers can exchange proposals and can reach 8(f) agreements. Norman’s presence and his participation in introductory remarks does not act to disenfranchise the individuals who sought to apply in person, in accordance with the Respondent’s own policy noted in its letter sent shortly before it ran new want ads.

A union organizer/representative has the right to pursue his union duties and to interact with others when he aids unemployed union members in seeking employment or when they jointly pursue organizing activities, including “salting” programs. Here, Norman and the applicants engaged in a courteous and non disruptive effort to submit application and, otherwise, the Respondent made no effort to ask Norman to leave or ask that it be allowed to see or interview the applicants alone. Instead, it asked if they were union workers, it adamantly stated it did not want union representation, it rejected any explanation that they were there only to seek the jobs offered in the newspaper, it pretextually told them it didn’t need any help (when it was hiring other ironworkers), and, with a display of rancor, it rejected an attempt to leave applications for consideration.

Under these circumstances, I find that the Respondent has failed to persuasively rebut the General Counsel’s showing of unlawful motivation and, accordingly, I find that the General Counsel has met its overall burden and shown that the Respondent’s failure and refusal to consider and hire the discriminatees named below violated Section 8(a)(3) and (1) of the Act, as alleged.

Lastly, I find that the Respondent’s dealings with applicant Griffith are not shown to be the same as those discussed above. His contact with the Respondent occurred in February prior to some of the other events and although Young made a comment

about not liking the treatment the Union was giving him, he apparently had no personal animosity towards Griffith and accepted and discussed his application and terms of employment. The record is somewhat ambiguous but either an offer of employment was on the table or was held open until the next morning. Griffith admits that he was unsure of his status but it is clear that he did not pursue the open offer to come in the next day and, under these circumstance, it cannot be found that the Respondent refused to consider or hire him as an ironworker. Accordingly, this portion of the complaint will be dismissed.

#### CONCLUSIONS OF LAW

1. Respondent is an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating applicants and employees about union membership and activity, creating the impression that an employee’s union activities were under surveillance, threatening to impose more onerous working conditions, and implying that support of a union would be futile; Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed them by Section 7 of the Act, and thereby has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

4. By discriminatorily imposing more onerous working conditions and by laying off or terminating employees because of and in retaliation for engaging in union activity or other protected concerted activities, the Respondent has violated Section 8(a)(3) and (1) of the Act.

5. By refusing to consider for employment or refusing to employ job applicants for the position of ironworker because they are members of the Union or for their union sympathies, Respondent discriminated in regard to hire in order to discourage union membership in violation of Section 8(a)(3) and (1) of the Act.

6. Except as found here, Respondent otherwise is not shown to have engaged in conduct violative of the Act as alleged in the complaint.

#### REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action set forth below to effectuate the policies of the Act.

With respect to the necessary affirmative action, it is recommended that the Respondent be ordered to make employees David Hibdon and John Norman whole for any loss of benefits they may have suffered because of the discrimination practiced against them by their premature layoff and termination by payment to them a sum of money equal to that which they normally would have earned it accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and to offer them full reinstatement to their former jobs, see *Norman King Electric*, 324 NLRB 1077, 1078 (1997).

It having been found that the Respondent unlawfully discriminated against job applicants John Norman, John Buntin, Derrick Haggard, Wesley Stillsmoking, and Floyd Woods, it will be recommended that Respondent offer the latter four applicants employment and make all of them whole for any loss of earnings they may have suffered by reason of the failure to give them nondiscriminatory consideration for employment, by payment to them of a sum of money equal to that which they normally would have earned in accordance with the method set

forth in *Woolworth*, *supra*, and *New Horizons for the Retarded*, *supra*.<sup>2</sup>

Other considerations regarding the Remedy and the specifics of the relief granted must wait until the compliance stage of the proceeding, see *Fluor Daniel, Inc.*, 304 NLRB 970, 981 (1991), and *Dean General Contractors*, 285 NLRB 573, 574 (1987). Otherwise, it is not considered necessary that a broad Order be issued.

[Recommended Order omitted from publication.]

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<sup>2</sup> Under *New Horizons*, interest is computed at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.